IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No.

BERT SMITH,
Petitioner,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, As Trustees of the Property of Florida East Coast Railway Company, a Florida Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

WILLIAM S. FRATES,
Attorney for Petitioner,
of NICHOLS, GAITHER, GREEN, FRATES & BECKHAM,
1111 Brickell Avenue,
Miami 32, Florida.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

Petitioner, Bert Smith, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal of Florida, Third District, affirming the judgment entered for respondents pursuant to a directed verdict by the Circuit Court for the Eleventh Judicial Circuit of Florida in this action under the Federal Employers' Liability Act, 45 U.S.C., Sec. 51, *et seq.*

OPINIONS BELOW.

The first opinion of the Third District Court of Appeal is reported at 104 So.2d 868 and is set out in Appendix A. The second opinion of the Third District Court of Appeal is reported at 118 So.2d 237, and is set out in Appendix B. The order of the Supreme Court of Florida on May 13, 1960, denying certiorari is unreported and is set out in Appendix C.

JURISDICTION.

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTION PRESENTED.

Did the Florida Appellate Court err in holding that when a railroad employee sustains personal injuries while performing an alleged physical fitness field test ordered by the railroad that the provisions of the Railway Labor Act, 45 U.S.C., Section 151, *et seq.*, preclude him from claiming that the giving of such a test under the facts and circumstances of this case was an act of negligence under the Federal Employers' Liability Act, 45 U.S.C., Section 51, *et seq.*?

STATUTES INVOLVED.

The pertinent sections of the Railway Labor Act and the Federal Employers' Liability Act are set out in Appendix D.

STATEMENT.

Petitioner fell and received injuries which totally and permanently disabled him in 1956 (R. 132-134). The events leading to his downfall are unique.

In 1956, respondents urged petitioner to retire. He refused (R. 51-56, 92, 213, 238). At that time, petitioner was sixty-one years old; 5'3" tall; and weighed 262 pounds (R. 212, 137, 117). He had rendered respondents thirty-six years of continuous service without a single demerit (R. 61, 212, 223, 362). Although his stamina and agility were impaired by arthritis and his portly physique, he was declared physically "*fit for duty as a flagman*" by the railroad's local doctor in Miami in August of 1956 (R. 39-44). This medical opinion was shared by respondents' chief surgeon who examined petitioner on September 10, 1956 (R. 119-120).

Respondents did not acquiesce in petitioner's retirement refusal. On September 13, 1956, petitioner became the first employee ever required to take a physical fitness "field test" in the history of respondents' railroad (R. 51, 68, 104, 115-116, 158). Respondents' supervisor who ordered petitioner to retire or take the test (R. 55-56, 93, 238) admittedly devised a test which he believed petitioner was physically unable to perform (R. 102, 106-108).

The "field test" in question required the 262 pound petitioner to walk a mile of track on a hot, humid day (R. 266, 187-189, 248) at a place described by one of respondents' conductors as follows:

> "They could have picked the whole railroad and never picked a worse spot to have a man walk than they did." (R. 384).

The portion of the track selected was littered with pieces of wire and covered with rocks and weeds (R. 384, 250). After walking some 1,000-1,500 feet, petitioner became entangled in a piece of wire and fell (R. 159-160, 182, 216). During the next 1,500 feet, he fell a second time on more wire; and finally fell a third time to rise no more (R. 161-163, 217-218). Even though petitioner was rushed to a doctor and received immediate medical attention (R. 162-163), the series of falls rendered him totally and permanently disabled (R. 132-134).

Petitioner sued respondents under the FELA setting out eight separate allegations of negligence (R. 2). The first two allegations of negligence were:

"a. In negligently and unlawfully requiring the plaintiff to participate in such a 'field test';

b. In negligently allowing its servants, agents or supervisors to conduct such a 'field test';" (R. 2).

The remaining six charges concerned failure to provide a reasonably safe place to work (R. 2).

At the trial, respondents contended that their right to give the test, or the manner in which it was given, could not be questioned in a FELA action and that petitioner could only complain of the matter in proceedings under the Railway Labor Act. The trial judge rejected this contention (R. 103, 292-295), and the case was tried accordingly.

Extensive evidence was offered tending to show that the railroad was negligent in requiring petitioner to perform the particular field test in question. Evidence was likewise introduced to show that the test was actually designed to force retirement rather than to determine petitioner's fitness as a flagman.

Among other things, petitioner's evidence showed that:

1. No other employee had ever been required to take such a test in the whole history of the railroad (R. 51, 68, 104, 115-116, 158);

2. For reasons best known to respondents, petitioner was told to either retire or take the test (R. 55-56, 93, 238). Until this ultimatum, respondents had always left questions of physical fitness to its medical department. A sick employee could not return to work until the medical department gave him a "fit for duty" slip called a "C.S.1" (R. 39-40, 109-110); and respondents' supervisors could order a physical examination of any working employee whose fitness was questioned (R. 50). The supervisor who ordered the "field test" did not require petitioner to take a physical examination for the admitted reason that he knew the medical department considered petitioner fit for service (R. 53).

3. The particular test given was one which respondents' supervisor admittedly believed petitioner was physically unable to perform (R. 102, 106-108).

4. It was not necessary for flagmen, such as petitioner, to walk a mile in performing their duties and the field test devised was not a true test of a person's ability as a flagman (R. 28-30, 70-71, 81, 100, 351-352, 395).

After all the evidence was in, the trial resulted in a $30,000.00 jury verdict and final judgment for petitioner (R. 497-498). The exact scope and effect of petitioner's evidence need not be further detailed or discussed because of the holding on appeal—no matter what the evidence, petitioner could not question respondents' right to give him the test. The District Court of Appeal, Third District, reversed petitioner's jury verdict and judgment with a holding that:

"* * * There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C.A., §151 et seq. Consequently, we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues. * * *" 104 So.2d at 869-870.

The case was remanded to the trial court for retrial on the remaining six allegations of negligence. At this stage of the proceedings, the Florida appellate court's holding was not subject to review by this Court because no final judgment had been entered. *Lavender* v. *Kurn*, 329 U.S. 762; 28 U.S.C., Sec. 1257(3).

The events which occurred on remand and on the second appeal of the case are succinctly summarized in the Third District Court of Appeal's second opinion in the case:

"This cause appeared before this court upon a prior appeal. See Butler v. Smith, Fla. App. 1958, 104 So.2d 868. Upon the return of the cause to the trial court pursuant to our mandate, the plaintiff elected to stand exclusively upon his claim, under the Federal Employers' Liability Act, 45 U.S.C.A., §51 et seq., that the railroad had no right to give the field test. The trial court entered judgment under authority of our prior opinion in this case. The plaintiff now appeals from this judgment. The only assignment of error presented is that the court erred in directing a verdict for the defendants. Appellant's brief recites 'The sole purpose of this appeal is to obtain a record on which this court's prior decision in Butler v. Smith, Fla. App. 1958, 104 So.2d 868, can be reviewed by the Supreme Court of the United States.'

The judgment of the trial court is affirmed upon the authority of Butler v. Smith, supra.

Affirmed." (118 So.2d 237).

After the Third District's affirmance of the directed verdict for respondents, petitioner sought review in the Supreme Court of Florida. The Florida Supreme Court denied certiorari on May 13, 1960.

FEDERAL QUESTION RAISED.

The Complaint (R. 1-3), trial proceedings, and opinions on appeal all show petitioner's repeated and continuous assertion of his rights under the FELA.

REASONS FOR GRANTING THE WRIT.

Petitioner urges this Court to grant this petition for a writ of certiorari to the District Court of Appeal of Florida, Third District, for the following reasons:

1. The decision below decides an important question of federal law regarding the interplay, if any, between two major Acts of Congress; the FELA and the Railway Labor Act.

2. The decision below decides a federal question of substance not heretofore determined by this Court, and decides it in a way probably not in accord with applicable decisions of this Court. The Railway Labor Act has thus far been regarded as legislation for the settlement of labor disputes. Cf. *Elgin, Joliet & Eastern Railway Co.* v. *Burley*, 325 U.S. 711; *Slocum* v. *Delaware L. & W. R. Co.*, 339 U.S. 239. Treating labor dispute legislation as a limitation on the FELA, conflicts with the liberal interpretation of the FELA which this Court has consistently demanded. *E.g., Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500.

3. The decision below is in direct conflict with the holding in *Barnes* v. *Public Belt R. R. Commission*, (E.D. La., 1951) 101 F. Supp. 200, 203, that:

> "Under Title 45, Section 51, United States Code Annotated, this court has jurisdiction of the claim by plaintiff against his employer for damages suffered by him through the negligence of his employer. The Railway Labor Act, 45 U.S.C.A., §§ 151-188, has no application to a claim for damages to the employee resulting from the negligence of an employer railroad. Elgin, Joliet & Eastern Railway Company v. Burley, 325 U.S. 711, 734, 65 S. Ct. 1282, 89 L. Ed. 1886; Virginian Railway Company v. System Federation No. 40, 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789; Order of Railway Conductors v. National Mediation Board et al., 72 App. D.C. 299, 113 F.2d 531. * * *."

4. Since the Railway Labor Act contains no provision allowing damages for personal injuries, the decision below deprives petitioner of a remedy for injuries caused by a tortious act.

5. The decision below is clearly wrong and deprives petitioner of a $30,000.00 jury verdict and final judgment to which he is entitled under federal law.

CONCLUSION.

Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

William S. Frates,

WILLIAM S. FRATES,
Attorney for Petitioner.

APPENDIX A.

Opinion and Judgment of the District Court of Appeal of Florida, Third District.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

July 22, 1958.

Rehearing Denied Sept. 29, 1958.

Case No. 57-332.

J. Turner Butler and William A. Hallowes, III, as Trustees of the Property of Florida East Coast Railway Company, a Florida corporation, Appellants,

vs.

Bert Smith, Appellee.

An Appeal from the Circuit Court for Dade County, Ray Pearson, Judge.

Scott, McCarthy, Preston, Steel & Gilleland, and Dwight Sullivan, Miami, for appellants,

Nichols, Gaither, Green, Frates & Beckham, and Sam Daniels, Miami, for appellee.

HORTON, Judge.

This was an action for personal injuries brought under the Federal Employers' Liability Act, 45 U.S.C.A., § 51, *et seq.* Final judgment in favor of the appellee was entered after a jury verdict. The appeal is from the final judgment.

Smith, 61 years of age, had been in the employ of the appellant railroad for approximately 37 years. For the last five or six years of his employment, Smith had been a flagman on passenger trains. His duties as a flagman were relatively few unless the train made an emergency stop or was otherwise delayed, in which event, he was required to set flares and place other warning signals at least one mile down the track to avert possible danger from oncoming trains.

For some time, Smith had suffered from arthritis and obesity. In the early part of 1956, a trainmaster of the appellant observed Smith's handicapped condition and questioned his ability to perform the duties of a flagman. An attempt was made to persuade Smith to retire but he declined. The appellant then authorized a "field test" to determine if Smith was capable of performing the duties of flagman. This test consisted of walking a mile along the railroad track from one mile post to another, since this would coincide with the duties Smith would be required to perform under emergency conditions. After traversing some 3,000 feet of the mile walk, Smith fell in exhaustion and injured his knee. He was hospitalized, returned to his home but never returned to work. Smith attributed his fall and injuries to two factors, *i. e.*, walking on gopherberry leaves which caused the soles of his shoes to become slippery, and becoming entangled in wire lying along the track.

The negligent acts or omissions charged in the complaint were:

(1) Requiring the appellee to participate in a field test;

(2) Allowing agents of appellant to conduct a field test;

(3) Furnishing a dangerous and unsafe location to conduct a field test;

(4) Furnishing a dangerous and unsafe place in which to work;

(5) Failure to use ordinary care in providing a safe place of work;

(6) Failure to provide a reasonably safe place to work;

(7) Failure to provide proper equipment and safeguards in the performance of duties and participation in a field test; and

(8) Failure to provide adequate supervision and instructions in conducting the field test.

The appellant's main point for reversal is the prejudicial manner in which the trial was conducted on behalf of the appellee. There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C.A., §151, *et seq.* Consequently we do not consider that items 1 and 2 under the charge of negligence, *supra*, constituted triable issues. The real issue in the case, which was apparently forgotten, was whether the appellant provided a reasonably safe place for appellee to work or perform the duties assigned him. *Seaboard Air Line R. Co.* v. *Gentry*, Fla. 1950, 46 So.2d 485; *Seaboard Air Line R. Co.* v. *Hardee*, Fla. 1951, 54 So.2d 809.

We have carefully reviewed the record in this cause, including the opening statements of counsel to the jury prior to the trial and the statements of counsel to the jury after the close of all the testimony, and are im-

pelled to the conclusion that this case was tried upon an immaterial issue tending toward and resulting in an unfair trial to the appellant. A large portion of appellee's opening statement to the jury prior to the trial spotlighted the theme upon which this cause was tried, namely, that appellant was "out to get" the appellee, that the test was never given to anyone before in the history of the railroad, and was a scheme cooked up to get rid of the appellee. Appellee's counsel, in his argument after the testimony had been completed, dwelled at length on the "get rid of Bert Smith" attitude and conduct of appellant. Appellee's concluding statement in his main argument at the close of all the testimony was:

> "Now I think you could stand up here and say that this was a dirty, rotten trick they pulled on this guy because that's my personal opinion. They were out to get him, and they did. They got him good; they got him so he won't work any more for them, and the law says—not my law—not the judge's law, but your law—says that under those circumstances they should pick up the check."

The appellee's entire case as reflected by this record conclusively indicates that it was premised upon the claim that appellant's conduct in requiring the appellee to take a field test was unlawful and that all of his injuries and damages resulted from such unlawful act. Nowhere in the pleadings has the appellee sought punitive damages. It is readily apparent that the jury could have been and was misled as to what the real issues were in the case. It would serve little purpose to delineate the many incidents appearing in the record which illustrate the basis for our conclusion that the cause should be reversed. However, the immateriality of the issues raised, as well as their prejudicial effect, were pointed out to the trial judge by ap-

pellants' motion for new trial. The motion should have been granted.

An appellate court is always reluctant to reverse a judgment based on a jury verdict for in doing so, it of necessity must sit in judgment of the facts which appear in a cold typed record without the benefit of observing the demeanor and conduct of the witnesses on the stand. However, it is another matter to reverse a cause for new trial when the record of that trial clearly shows that the cause was tried on immaterial issues serving to implant in the minds of a jury prejudice or bias against one of the parties. We do not attribute to appellee's counsel sinister motives but rather an overzealousness for the interests of his client. However, when the result raises an emotional prejudice in the minds of the jury on an immaterial issue, then justice has been thwarted and the parties have been denied a fair and impartial trial of their cause. Cf. *Seaboard Air Line Railroad Company* v. *Strickland*, Fla. 1956, 88 So.2d 519, and *Seaboard Air Line Railroad Company* v. *Ford*, Fla. 1957, 92 So.2d 160, 165.

In view of the opinions expressed, we do not consider it necessary to discuss the other points raised by appellants. Accordingly, the judgment appealed from is reversed and the cause is remanded for a new trial.

Reversed and Remanded.

CARROLL, CHAS., C. J., and PEARSON, J., concur.

APPENDIX B.

Opinion and Judgment of the District Court of Appeal of Florida, Third District.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

February 25, 1960.

BERT SMITH, Appellant,

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, As Trustees of the property of Florida East Coast Railway Company, a Florida corporation, Appellees.

An Appeal from the Circuit Court for Dade County; Ray Pearson, Judge.

Nichols, Gaither, Green, Frates & Beckham and Sam Daniels, Miami, for appellant.

Harold B. Wahl and Scott, McCarthy, Preston, Steel & Gilleland and Dwight Sullivan, for appellees.

PER CURIAM.

This cause appeared before this court upon a prior appeal. *Butler* v. *Smith*, Fla. App. 1958, 104 So.2d 868. Upon the return of the cause to the trial court pursuant to our mandate, the plaintiff elected to stand exclusively upon his claim, under the Federal Employers' Liability Act, 45 U.S.C.A., §51 *et seq.*, that the railroad had no right to give the field test. The trial court entered judgment under authority of our prior opinion in this case. The

plaintiff now appeals from this judgment. The only assignment of error presented is that the court erred in directing a verdict for the defendants. Appellant's brief recites "The sole purpose of this appeal is to obtain a record on which this court's prior decision in *Butler* v. *Smith*, Fla. App. 1958, 104 So.2d 868, can be reviewed by the Supreme Court of the United States."

The judgment of the trial court is affirmed upon the authority of *Butler* v. *Smith, supra*.

Affirmed.

HORTON, C. J., and PEARSON, and CARROLL, CHAS., JJ., concur.

APPENDIX C.

Order of the Supreme Court of Florida Denying Certiorari.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM A.D. 1960

FRIDAY, MAY 13, 1960

BERT SMITH, Petitioner,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III, as Trustess of the property of FLORIDA EAST COAST RAILWAY COMPANY, a Florida corporation, Respondents.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Third District, in said cause bearing date February 25, 1960, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

APPENDIX D.

Statutes Involved.

The Federal Employers' Liability Act, 45 U.S.C., Section 51, provides:

"51. LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE: DEFINITION OF EMPLOYEES.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation of nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as

above set forth shall, for the purpose of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

Railway Labor Act provides in pertinent part:

"§151a. GENERAL PURPOSES.

The purposes of the chapter are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."